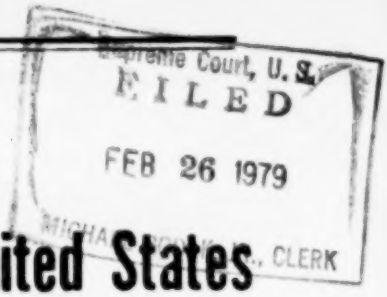

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1320

EDWARD LEE WHITTEN,

Petitioner.

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EDWARD LEE WHITTEN
PRO SE
85 Highway 51 South
Hernando, Mississippi 38632

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IN THE
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Edward Lee Whitten, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1979.

I.

OPINION BELOW

The opinion of the Court of Appeals is attached hereto in the Appendix. There was no published opinion of the District Court's rulings or the verdict of the jury.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on January 26, 1979, but was not recorded and mailed until January 30, 1979. This petition was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 18 U.S.C. § 1254 (1) (1970).

III.

QUESTIONS PRESENTED

Whether giving of the "Allen" charge denies a defendant trial by an impartial jury, due process and equal protection of the laws.

Whether the decision below was erroneous for the reason that there was a fatal variance between the Indictment and the proof.

Whether the mail fraud statute (18 U.S.C. § 1341) (1970) applies to cases where the subject mailing is sent in obedience of a direct imperative of state law and where there is no direct proof that the mailing was part of a scheme to defraud.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution - Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime . . . nor be deprived of life, liberty or property, without due process of law.

United States Constitution - Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .

18 U.S.C. §2 (1970):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §1341 (1970):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or

furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Miss. Code Ann. §91-7-145 (1970):

It shall be the duty of the executor or administrator to publish in some newspaper in the county a notice requiring all persons having claims against the estate to have the same probated and registered by the clerk of the court granting letters, within six months, which notice shall state the time when the letters were granted and that a failure to probate and register for six months will bar the claim. The notice shall be published for three consecutive weeks, and proof of publication shall be filed with the clerk. If a paper be not published in the county, notice by posting at the courthouse door and three other places of public resort in the county shall suffice, and the affidavit of such posting filed shall be evidence thereof in any controversy in which the fact of such posting shall be brought into question.

The filing of proof of publication as provided in this section shall not be necessary to set the statute of limitation to running, but proof of publication shall be filed with the clerk of the court in which the cause is pending at any time before a decree of final discharge shall be rendered; and the time for filing proof of publication shall not be limited to the six months period in which creditors may probate claims.

V.

STATEMENT OF THE CASE

Please note that record references are to pages in the trial transcript found in the six volumes of testimony in this case.

This case involves an alleged mail fraud scheme relative to a will. Petitioner Whitten and Louin Ray Bright were indicted in a six count Indictment charging violations of 18 U.S.C. §§ 2 and 1341 (1970) (conspiracy and mail fraud). Specifically, it was charged that the two men prepared or caused to be prepared a forged will of J. B. Bright, a relative of both men. From the premise that Petitioner was involved in a forgery of a will, the indictment charged mail fraud as to two classes of mailings: newspapers containing required Notice to Creditors, and three letters under the letterhead of Petitioner's law firm. These letters addressed to three heirs advised them of the fact that a J. B. Bright will was being probated in Mississippi state court.

Trial was held in the United States District Court for the Nothern District of Mississippi, Western Division. Evidence presented may be briefly summarized:

(1) ***The J. B. Bright Will:*** - On April 17, 1973, J. B. Bright went to the offices of Petitioner to have a will prepared. A will

was drawn up, signed, witnessed and placed in the office safe. Neither Petitioner Whitten nor Louin Ray Bright had the combination to the safe. (R. 568, 1158)

On the first Monday of June, 1974, J. B. Bright again came to Petitioner's office. He wanted certain changes made in the will. The day was the first day of the Court term in Desoto County, Mississippi. Petitioner had his secretary bring the 1973 Will. Petitioner scribbled changes and dashed off to court. He left his secretary to type in the changes. (R. 1159-1162)

Under the terms of the second Will, J. B. Bright left all of his property to his wife and named her executrix. Bright was named as Executor in the event Mrs. Bright predeceased J. B. Bright. In the event Mrs. Bright predeceased J. B. Bright, then the property was left to the natural heirs of J. B. Bright and the natural heirs of his late departed wife, Mrs. J. B. Bright, in equal shares.

(2) *Probation of the J. B. Bright Will:* - In August of 1974, J. B. Bright and his wife were involved in a serious automobile accident. Mrs. Bright died shortly after the accident. J. B. Bright lived for several months but never regained his faculties. He died in November of 1974.

Aaron L. Ford, another attorney, prepared a will for J. B. Bright in 1965. The original of that Will was never found. Mr. Ford undertook to probate a copy of the 1965 Will. (R. 286, 287)

As soon as Petitioner found out about J. B. Bright's death, he ordered a secretary to get the will. He then called Bright and informed him that the will needed to be probated. Petitioner prepared the necessary documents. A Notice to Creditors was filed in the Chancery Court of Benton County, Mississippi. (R. 65, 1165, 1166, 1171)

The filing of the J. B. Bright Will caused a will contest in State Court. After protracted litigation, an agreement was reached in which the heirs of J. B. Bright accepted $125,000 as a compromise settlement. (R. 142) All of the contestants thought that the settlement disposed of the case. None of the contestants initiated the prosecution of Petitioner. (R. 142)

(3) *The testimony at trial level:* - The Government put three handwriting experts on the stand: John Molcoch, Charles Scott, and Linton Godwin. Each of these men stated that they could not say that Edward Lee Whitten forged any signatures on the J. B. Bright Will. (R. 627, 691, 692, 715, 716)

Aaron Ford, a legatee under the contested Will, testified that he agreed to the State Court settlement and would not have done so had he thought anything was improper. (R. 281) He testified he knew the signature of J. B. Bright and in his opinion the contested Will bore the genuine signature of J. B. Bright. (R. 278-279) Mrs. Baker and her immediate family testified. Each of these witnesses evidenced a bias against Ray Bright which was understandable since under the terms of the J. B. Bright Will, they lost a large portion of the inheritance under the former Will. (R. 198, 199) Mrs. Baker testified the signature on the Will did not appear to be that of J. B. Bright. The same woman identified a Deputy United States Marshal as Ray Bright. (R. 132, 133)

(4) *Trial Court's giving of the "Allen" Charge:* - The jury retured to consider the verdict on Thursday, February 23, 1978, at approximately 5:30 P.M. A copy of the pertinent part of the initial charge is reproduced in the Appendix to this Petition. At approximately 10:15 P.M. that night, the jury sent word that it was hopelessly deadlocked. The trial court then called the jurors in and recessed until 9:00 A.M., Friday, February 24, 1978 and allowed them to return to their homes. (R. 1439, 1440) At this point, it must be remembered that

many of the jurors lived great distances from the court. Three of the jurors were women and lived great distances from the Courthouse. The other nine jurors were also required to travel great distances that Thursday night.

At 9:00 A.M., Friday, February 24th, the jury resumed its deliberations. At approximately 11:57 A.M., the trial court notified the defendants that the jury had sent a note to the Judge informing him that the jury was not able to reach a verdict. (R. 1441, 1442)

The Court called the jury in and asked if the jury was able to reach a verdict. The foreman announced that they were not and that a vote had just been taken, prior to coming into Court, following the noon recess on Friday and there was no change. (R. 1443)

Without previously notifying counsel for defendants of his intentions to give the modified *Allen* charge, the trial court immediately charged the jury. The full context of the supplemental charge appears in the Appendix.

Immediately after the charge was given, the trial court ordered the jurors to be taken back to the jury room. After the jurors left the courtroom, defendants objected to the charge and requested further instructions, all of which was denied. (R. 1446-1448)

VI.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ of certiorari in this case. The decision of the Court below is in direct conflict with the decisions of other Circuits on the matter of the giving

of the "Allen" charge. The decision below was erroneous for the reason that there was a fatal variance between the Indictment and the proof. The decision below misapplies the mail fraud statute and relevant judicial rulings as to that statute.

A.

CONFLICT WITHIN THE CIRCUITS

Rule 19 (1) (b) of the Revised Rules of this Court provides that a writ of certiorari may issue where:

> . . . a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same point. U. S. Sup. Ct. Rule 19 (1) (b), 28 U.S.C.

The decision of the Fifth Circuit Court of Appeals below satisfies that test. Petitioner Bright specifically raised the issue of the trial court's giving a modified form of the "Allen" charge. He pointed out the case at bar differed from the leading Fifth Circuit case approving the charge: ***United States v. Bailey***, 468 F.2d 652 (5th Cir. 1972) ***aff'd en banc***, 480 F.2d 518 (5th Cir. 1973) in that herein there was no direct proof linking the defendant with the crime charged. (Brief for Appellant, pages 44, 45) Thus, giving of the modified "Allen" charge coerced the jury into voting for conviction. In its decision the Fifth Circuit ruled that the :

> . . . contention is meritless. The trial judge read a version of the Allen charge substantially identical to the instruction approved in ***United States v. Skinner***, 5 Cir. 1976, 535 F.2d 325, 326 n. 2, ***cert. denied***, 429 U.S. 1048, 97 S.Ct. 756, 50 L.Ed. 2d 762, which was in turn derived from the Allen charge upheld by this court, sitting en banc, in ***United States v. Bailey***.

The Fifth Circuit's continued approval of the "Allen" charge in any form is in direct contradiction with the decisions of at least three other Circuits. In ***United States v. Fioravanti,*** 412 F.2d 407 (3rd Cir. 1969) ***cert. denied, Panaccione v. United States,*** 396 U.S. 837 (1969), the Third Circuit Court of Appeals rejected the use of the "Allen" charge by describing it as:

> . . . an unwarranted judicial invasion into the exclusive province of the jury and adds the blind imprimatur of the trial court to a matter of which it has absolutely no information: the results of the preliminary balloting in the jury room. 412 F.2d at 417.

The Seventh Circuit has ruled that:

> We are convinced, however, that the Allen-type charge given in this case contains elements which are in conflict with the American Bar Association recommended standards. In order to avoid the potential for prejudice and coercion to which we have referred, district courts in this Circuit are required henceforth to charge deadlocked juries in both criminal and civil cases in a manner consistent with the recommended standards. ***United States v. Brown,*** 411 F.2d 930, 935 (7th Cir. 1969) ***cert. denied,*** 396 U.S. 1017 (1969).

The District of Columbia Circuit has outlawed the charge as well. ***United States v. Thomas,*** 146 U.S. App. D.C. 101, 449 F.2d 1177 (1971)

The effect of the split in the Circuits is to predicate the right to an impartial jury trial upon the location of the proceedings. If a defendant is tried within the District of Columbia, the Third or Seventh Circuits, the individual will not be subjected to the potential or actual prejudice inherent in an "Allen" charge. If however, the defendant is tried within one of the

Circuits which still condone the charge, there will always remain the strong possibility that a District Court judge will instruct the individual juror to ". . . listen . . . with distrust of his own judgment. . . ." Due process of law and an impartial jury which are guaranteed to every defendant by the Fifth and Sixth Amendment are put in a relative context: dependent upon the location of the trial.

The situation thus before the Court is analogous to that which prevailed after the decision in ***Betts v. Brady,*** 316 U.S. 455 (1942). After the ***Betts*** decision, trial courts were continually perplexed by questions as to whether the gravity of a particular crime warranted appointed counsel for an indigent defendant. The net effect was to place a defendant's right to counsel in a state of ". . . controversy and litigation in both state and federal courts." ***Gideon v. Wainwright,*** 372 U.S. 335, 338 (1963). This Court noted that certiorari was granted in ***Gideon*** "To give this problem another review." 372 U.S. at 338. With ***Gideon,*** this Court gave clear direction on a point of law.

This case is important. Obviously, it is important to the petitioner. But it is important to the system of justice as well. As matters presently stand there is in the Federal courts system much "controversy and litigation" as to the "Allen" charge. The Fifth Circuit's initial opinion in the ***Bailey*** case noted with particularity the divergence of opinions within the Circuits on this matter. 468 F.2d at 667, 668.

Petitioner is not unaware of the fact that this Court has in the past rejected Petitions for Writs of Certiorari when the issue of the "Allen" charge was raised. However, petitioner respectfully submits that the time is at hand for a sure and swift pronouncement as to the validity of a jury instruction which came into fashion in 1896. ***Allen v. United States,*** 164 U.S. 492 (1896). At a time when the federal courts are overburdened with litigation, a concise statement of guidance on this point of

law would greatly serve to reduce the workload of the Courts and at the same time assure that defendants are given full Fifth and Sixth Amendment protection.

B.

FATAL VARIANCE BETWEEN INDICTMENT AND PROOF

The second reason why certiorari ought to be granted is that the Fifth Circuit Court's opinion below decided a question of federal law ". . . in a way in conflict" with an applicable decision of this Court. U. S. Sup. Ct. Rule 19 (1) (b) 28 U.S.C.

In ***Stirone v. United States,*** 361 U.S. 212 (1960), this Court ruled that in a criminal case where there is a variance between the pleadings (Indictment) and the proof such a difference:

> . . . destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation if such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

In ***Stirone,*** the district court allowed evidence of activity not charged in the Indictment to go to the jury.

Herein, Petitioner Whitten was charged with preparing and causing to be prepared a ". . . forged will" of J. B. Bright. During the trial three Government handwriting experts testified that they could not state that petitioner Whitten or his co-defendant, Louin Ray Bright, forged any signatures on the J. B. Bright will. Notwithstanding the variance between the Indictment and the proof the trial court let the case go to the jury.

In affirming his conviction, the Fifth Circuit fell into the logical trap baited by the Government. The Court of Appeals noted that:

> Forgery was the first step in the scheme, but to ensure the plan's success appellants also had to maneuver themselves into positions of control over the estate's assets and guide the will through probate.

However, if there was no conclusive proof as to the "first step" the rest of the case against petitioner falls like a house of cards. The foundation of the Indictment was that Edward Lee Whitten forged or caused to be forged the J. B. Bright Will.

In ***Stirone,*** the district court allowed evidence of other activities to go to the jury. The only saving grace, if it can be called that, in the district court's action was that there was an established connection between Nicholas Stirone and the additional activity. In this case, the government conceded that anyone could have forged the J. B. Bright Will. In effect, the Fifth Circuit, by its decision, has established the principle that where an Indicment charges forgery - - there need not be proof of forgery by the defendant in order to sustain a conviction.

The grand jury charged Edward Lee Whitten with forgery of the J. B. Bright Will. When the government failed to prove that petitioner or anyone else specifically forged the Will, the district court should have dismissed the case for variance. By letting it go to the jury, the trial court, in effect, amended the Indictment by not requiring proof of forgery on the part of Petitioner. This Court answered such judicial activity by ruling in *Stirone* that:

> The right to have the grand jury make the charge on it own judgment is a substantial right which cannot be taken away with or without court amendment. 361 U.S. at 218, 219

C.

APPLICABILITY OF MAIL FRAUD STATUTE AND RELEVANT CASES TO THE CASE AT BAR

In *Parr v. United States*, 363 U.S. 1277 (1960) this court ruled that:

> . . . it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the mail fraud statute. . . . 363 U.S. at 391

In *United States v. Maze*, 414 U.S. 395 (1974), this Court affirmed a Sixth Circuit Court of Appeals decision which reversed a mail fraud conviction. This Court's opinion noted that the mailings were not sufficiently related to the alleged scheme to defraud through the use of a stolen credit card. In its decision this Court relied upon *Kahn v. United States*, 323 U.S. 88 (1944) for the principle that the subject mailing be sent for the purpose of "executing the scheme" to defraud. 323 U.S. at 94.

It is respectfully submitted that the decision of the Court of Appeals below decided a question of federal law ". . . in a way in conflict with applicable decisions of this court." U. S. Sup. Ct. Rule 19 (1) (b), 28 U.S.C. There was no proof that the three letters to the heirs (which formed the basis of Counts I, II, and III) were in any way related to any scheme to defraud. Assuming *arguendo*, petitioner was part of a scheme to loot the J. B. Bright estate, the probation of the Will was all that was necessary. The three letters surely did not lull the heirs into any false sense of security.

As to the Notice of Creditors published in the *Southern Advocate* newspaper (which formed Counts IV, V and VI of

the Indictment), there was no actual proof that petitioner was involved in any scheme. Therefore, the mailing of the Notice of Creditors was in compliance with the requirements of Miss. Code Ann. §91-7-145 (1972).

Because the decision below conflicts with the clear holding and logic of established Supreme Court precedent, a writ of certiorari is proper.

CONCLUSION

Petitioner knows that every year this Court is flooded with Petitions for Writs of Certiorari. Each petitioner believes that his or her cause merits Supreme Court attention. But the test is objective analysis and not subjective belief. To that end Rule 19 was promulgated.

This case satisfies the requirements set down for granting a writ of certiorari. There is a continued and vexing conflict within the Circuits as to the "Allen" charge. The Court below decided important questions in a manner contrary to the clear precedent of Supreme Court decisions.

This case is important for Petitioner and for every citizen. Unless and until this Court finally and definitely addresses the subject of the propriety of the "Allen" Charge there will be confusion in the federal courts. That confusion will only result in needless appeals. This case affords the Supreme Court the unique opportunity to resolve a whole body of law; to provide uniformity in the respective Federal Court Circuits and Districts; and insure Constitutional rights to the citizens of this nation.

Full Supreme Court review is proper herein. The Writ of Certiorari should issue.

Edward Lee Whitten pro se.

Edward Lee Whitten
Pro Se
85 Highway 51 South
Hernando, Mississippi 38632

CERTIFICATE OF SERVICE

I, Edward Lee Whitten, filing this Petition for Writ of Certiorari, PRO SE hereby certify that on this the 24th day of February, 1979, I served three (3) copies of the foregoing Petition for Writ of Certiorari on each of the following offices:

1. Honorable H. M. Ray, United States Attorney, at his post office address: Post Office Drawer 886, Oxford, Mississippi. 38655, by mailing him three (3) copies, postage prepaid, by United States Mail.

2. On the United States by mailing three (3) copies thereof in a duly addressed envelope, postage prepaid, by United States Mail, to the Honorable Griffin Bell, United States Solicitor General, United States Department of Justice, Washington, D.C.

Edward Lee Whitten pro se.

Edward Lee Whitten
Petitioner
PRO SE

APPENDIX

APPENDIX A

[2458] [2458]

[2458] UNITED STATES v. BRIGHT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Louin Ray BRIGHT and Edward Lee Whitten,
Defendants-Appellants.

NO. 78-5184.

United States Court of Appeals,
Fifth Circuit.

Jan. 26, 1979.

Defendants were convicted before the United States District Court for the Northern District of Mississippi, Orma R. Smith, J., of using the mails for purposes of executing a plan to defraud the estate and beneficiaries of their late cousin, and they appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) even accepting one defendant's claim that there was no proof that he forged any signatures on will or that such signatures were forged his participation in alleged scheme was established by other evidence; (2) letters alerting recipients of their rights under forged' will fell within scope of mail fraud statute; (3) mailing of newspapers containing notice to estate's creditors was also covered by the mail fraud statute; (4) in light of jury's assertion that it was deadlocked and requested further instructions it was not abuse of discretion to give approved version of *Allen* charge, and (5) it was not abuse of discretion to permit Government to cross-examine defense character

witness, an attorney, regarding one defendant's alleged reprimand by a judge and bar association.

Affirmed.

1. Post Office Key 35(2)

Offense of mail fraud has two essential elements: (1) a scheme to defraud; and (2) the causing of a mailing for purpose of executing that scheme. 18 U.S.C.A. § 1341.

2. Post Office Key 49(11)

Even accepting defendant's claim that there was no proof that he forged any signatures on will or that any signatures were forged, there was sufficient evidence of his participation in alleged scheme to defraud the estate and beneficiaries, so as to warrant conviction under mail fraud statute, where drafting of forged will naming one defendant as executor was first step in scheme and indictment encompassed defendant's selection of codefendant as attorney and his misappropriation of substantial sum of estate assets and signed and filed papers necessary to ensure probate of the forged bill. 18 U.S.C.A. § 1341.

3. Post Office Key 35(6)

Letters alerting recipients of their rights under forged will fell within scope of mail fraud statute since such letters were intended to aid defendants in convincing beneficiaries that a genuine will had been found, thereby easing forged wills' forged through probate and helping insure defendants' control of estate assets. 18 U.S.C.A. § 1341.

4. Post Office Key 35(8)

Mailing of three issues of official newspaper containing notice to estate creditors fell within scope of mail fraud statute since under Mississippi law defendants, who allegedly devised

scheme to defraud their cousins' estate as beneficiaries, had to file the creditors' notice to secure admission of forged will to probate, and publication of notice heightened false impression that forged will was valid and thereby increased chances [2459] of its success for probate. 18 U.S.C.A. § 1341.

5. Criminal Law Key 863(1)

On receiving notice that jury is deadlocked a trial judge is not required to notify defense counsel of his plan to use an *Allen* charge; if defense counsel is present when the instructions are actually read to the jury and is afforded the opportunity to object, such is sufficient.

6. Criminal Law Key 863(1)

In light of jury's assertion that it was deadlocked and its request for further instructions, trial judge did not abuse its discretion in giving approved version of the *Allen* charge.

7. Witnesses Key 274(2)

When a witness has testified in support of defendant's good character, the trial court may in its discretion allow the Government to attempt to undermine credibility of that witness on cross-examination by asking him whether he has heard of prior misconduct of defendant which is inconsistent with the witness' direct testimony. Fed.Rules Evid. rule 403, 28 U.S.C.A.

8. Witnesses Key 274(2)

Two limitations on judicial discretion in permitting cross-examination of a defense character witness concerning defendant's prior misconduct are requirement that the prosecution have some good-faith factual basis for the incidents inquired about and a requirement that the incidents inquired about are relevant to the character traits involved at trial. Fed.Rules Evid. rule 403, 28 U.S.C.A.

9. Witnesses Key 274(2)

It was not abuse of discretion to allow Government to cross-examine defendant's character witness, a lawyer, regarding defendant's alleged reprimand by a judge and bar association for unprofessional conduct where witness testified on direct examination that defendant had a good general reputation in his community for veracity and integrity and witness declared that he believed defendant under oath. Fed. Rules Evid. rule 403, 28 U.S.C.A.

10. Witnesses Key 274(2)

Government's proffer of a letter of reprimand for stipulation and its willingness to reopen case in attempt to prove fact of defendant's reprimand by a judge and bar association demonstrated the necessary good-faith factual basis for cross-examination of defense character witness, an attorney, regarding defendant's reprimand. Fed.Rules Evid. rule 403, 28 U.S.C.A.

Appeals from the United States District Court for the Northern District of Mississippi.

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge:

Edgar Lee Whitten and Louin Ray Bright [1] appeal their

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1. **The indictment called Bright "Lorin," but according to his brief on appeal that is incorrect. The Government's brief also refers to him as "Louin."**

convictions for mail fraud under 18 U.S.C. §§ 2 [2] and 1341. [3]
[2460] Both appellants challenge the sufficiency of the evidence and attack the district court's supplemental instructions to the jury; Whitten also contends that the trial judge erred in allowing the Government to conduct prejudicial cross-examination of a character witness. We reject these assertions and affirm the convictions.

I. The Facts

The convictions of Whitten, a lawyer practicing in DeSoto County, Mississippi, and his uncle Ray Bright, formerly Chief

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2. 18 U.S.C. § 2 provides in pertinent part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

3. Under 18 U.S.C. § 1341,

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Deputy Sheriff of adjoining Marshall County, stemmed from their indictment on charges of using the mails for the purpose of executing a plan to defraud the estate and beneficiaries of their late cousin, J. B. Bright. [4] J. B. and his wife were involved in an automobile accident on August 19, 1974; Mrs. Bright died the next day and J. B. passed away, at the age of 88, on November 21, 1974. A retired rural mail carrier, J. B. Bright left a gross estate of $1,196,707.20.

J. B. executed a will in 1965, dividing his estate among his wife, his two sisters, Nannie Tidewell and Allie Bright Baker, and Mrs. Baker's children. When Mrs. Tidewell died in 1971, he executed a codicil, redistributing her share among the other beneficiaries. Since J. B.'s wife predeceased him, Allie Baker and her children were the only beneficiaries under the 1965 will surviving at the time of J. B.'s death and in the event of intestacy Mrs. Baker was also her brother's sole heir at law.

Aaron Ford, J. B. Bright's brother-in-law [5] and regular attorney, prepared the 1965 will. J. B. kept the original and a favored nephew, named as a trustee in the will, took a Xerox copy for safekeeping. After J. B.'s death, however, the original 1965 will was never found and on Allie Baker's petition as sole heir Aaron Ford opened an intestate estate, with Howard Ford, Aaron's brother and J. B.'s former partner in a construction business, named as administrator.

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4. Ray Bright was a third and Whitten a fourth cousin to J. B. Bright.

5. Aaron and Howard Ford are the brothers of J. B. Bright's late wife.

On January 3, 1975, appellants Whitten and Ray Bright filed with the Chancery Court of Benton County, Mississippi, a document purporting to be J. B. Bright's will, dated April 17, 1973. This alleged will named Ray Bright executor of his cousin J. B.'s estate and Ray chose his nephew Whitten to be the estate's lawyer. Bright and Whitten also filed a petition, signed by them in their respective capacities as executor and attorney for the estate, to probate the will and the document was admitted into probate on January 3. Along with the will and petition appellants submitted to the court a notice to the estate's creditors, as required by state law; the court subsequently sent this notice to the *Southern* [2461] *Advocate*, the local weekly newspaper, which published it in three successive issues.

On January 8, Whitten sent letters through the mail to Aaron Ford, Howard Ford and Allie Baker, informing them that he had found J. B.'s will, that they were named as beneficiaries and that he wished to discuss the matter with them in person. Appellants Whitten and Bright visited the Ford brothers and Mrs. Baker on January 9 and 10. The Fords agreed, in light of the newly discovered will, to terminate the administration of the intestate estate and to stand aside in deference to Ray Bright as executor. However, when appellants first showed Mrs. Baker and her daughter and son-in-law, Allene and William Wiley, a copy of the will, they immediately became suspicious as to its authenticity. They questioned the genuineness of J. B.'s signature, wondered why Mrs. Baker's brother had named as executor a distant cousin with whom he had not been close and observed that the document referred to Mrs. Baker as "Alice" rather than Allie, the name by which she was known to her brother J. B. Acting upon these suspicions, Mrs. Baker employed counsel and contested the will in Chancery Court. She later agreed to pay $125,000 to settle this contest, "because at my age I didn't feel like I could go through court for eight or ten years," and the court entered a decree setting aside

the 1973 will and admitting to probate the 1965 will. The decree noted that the 1973 document filed by appellants "was not attested by two or more witnesses as required by statute and is, therefore, no will."

On December 9, 1977, a grand jury indicted appellants Whitten and Bright on six counts of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341. Each count set forth the same five-part scheme to defraud J. B. Bright's estate and its beneficiaries, alleging: that appellants "did prepare and caused to be prepared and filed" a forged will; that they "were resulting beneficiaries under the fraudulent will"; that Ray Bright "would and did serve as executor" of his late cousin's estate; that Bright, "in addition to receipt of an executor's fee . . . would and did unlawfully and fraudulently convert to his own use" more than $81,000 worth of the estate's assets; and that Bright "would and did hire" Whitten as attorney for the estate. Each count then specified a separate mailing caused by appellants "for the purpose of executing the aforesaid scheme and artifice to defraud." Counts I through III described the three letters that Whitten sent to the Ford brothers and Mrs. Baker and Counts IV through VI enumerated the three issues of the *Southern Advocate*, containing the notice to creditors that appellants filed with the Chancery Court, which were mailed to the paper's subscribers.

At trial, appellants contended that J. B. Bright came to Whitten's office on April 17, 1973, and executed a will. According to appellants, J. B. returned to Whitten's office on the first Monday in June 1974 to make a new will, with the most important change being inclusion of the Ford brothers as beneficiaries. [6] Because this was a busy day at court, Whitten

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6. **Whitten's secretary, Mrs. C. V. Green, and her husband, Boyd, a business partner of Whitten, testified that they had seen J. B. Bright in Whitten's office sometime in the spring or summer of 1974. Boyd Green said that J. B. had told him that he was there to revise his will.**

wrote the changes in longhand on the original will and gave it to his [2462] secretary, instructing her to type the new will on the personal typewriter he kept in his office. Whitten testified that he then left for court, without seeing the typed version of the revised will or observing its execution. During his testimoney, Whitten also stated that his secretary failed to change the date in typing the revised will, thereby accounting for the discrepancy between the date appearing on the document filed with the probate court and the date of its alleged preparation. Ray Bright denied any involvement in the preparation of the will.

Two secretaries in Whitten's office, Mable Hays and Jocile Woolfolk, allegedly witnessed and signed the purported will. [7] However, both women testified that the signatures appearing on the document were not genuine and three handwriting experts agreed that the women's signatures had been forged. In addition, Allie Baker, her son, James Bowen Baker, and her son-in-law, William Wiley, testified that it was not J. B.'s real signature that appeared on the will dated April 17; three expert witnesses concurred in that opinion. Moreover, according to the testimony of an employee of the Southworth Paper Company, which produced the paper on which the will dated April 17, 1973 was typed, that paper was not manufactured until 1974. Finally, Ray Bright admitted on the stand that he had "used"

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7. On January 3, 1975, Miss Hays and Miss Woolfolk both signed the proof of will, attesting that they had witnessed the document's execution. Whitten visited Woolfolk at her home, showing her either the original or a copy of the will and asking her to sign the proof of will. Woolfolk questioned whether the signature on the will was hers and signed the proof only upon Whitten's assurance that the signature was genuine. Hays also did not remember having witnessed or signed the will; she did not recall seeing the original or a copy of the will on January 3, but relied on Whitten's assurances in signing the proof.

for personal purposes more than $81,000 worth of the estate's assets.

After a two-week trial, the jury convicted Whitten and Ray Bright on all six counts of the indictment. The appellants each received concurrent sentences of three years on each count.

II. The Sufficiency of the Evidence

[1] Appellants Whitten and Bright first challenge the sufficiency of the evidence supporting their convictions, asserting that the district court erred in denying their motions for judgments of acquittal. They contend that the Government failed to show that they caused the forgery of the will and argue that the mailings specified in the indictment and proved at trial did not constitute use of the mails within the meaning of 18 U.S.C. § 1341. These arguments are without merit. The offense of mail fraud under section 1341 has two essential elements: (1) a scheme to defraud, and (2) the causing of a mailing for the purpose of executing that scheme. ***United States v. Crockett***, 5 Cir., 1976, 534 F.2d 589, 593; ***United States v. Green***, 5 Cir., 1974, 494 F.2d 820, 823-24, ***cert. denied***, 419 U.S. 1004, 95 S.Ct. 325, 42 L.Ed.2d 280 (1974). Here, there is ample evidence to support each necessary part of the offense.

A. The Scheme to Defraud

[2] Contrary to appellants' contention, the scheme to defraud set forth in the indictment was not limited to the actual forgery of the will. Forgery was the first step in the scheme, but to ensure the plan's success appellants also had to maneuver themselves into positions of control over the estate's assets and guide the will through probate. Ac-

[2463] cordingly, the indictment encompassed Ray Bright's selection of Whitten as attorney for the estate and Bright's misappropriation of more than $81,000 of the estate's assets. Bright named Whitten as the estate's lawyer, accompanied him on his visits to the Ford brothers and Mrs. Baker, signed and filed the papers necessary to ensure admission of the forged will into probate and assumed management of the estate's assets. Moreover, he admitted under oath that he had "used" over $81,000 of those assets for personal purposes. [8] Thus, even if we accept Bright's claim that there was "no proof" that he "forged any signatures or knew that any signatures were forged," his participation in the alleged scheme is still clear.

The Government presented overwhelming evidence that the will was forged. The purported witnesses to the will denied having signed it and expert testimony supported their contentions. Handwriting experts also agreed with relatives of J. B. Bright that J. B.'s signature was not genuine. The document, dated April 17, 1973, was typed on paper not manufactured until 1974 and it called the testator's only living sister by an incorrect name. Though Whitten claimed not to have observed the will's execution, he admitted preparing the document and directing his secretary to type it. No one else with access to Whitten's files, where the will was allegedly "found," had any plausible motivation to cause the forgery of the will. In light of the foregoing, we cannot say that "the jury must necessarily have had a reasonable doubt" regarding appellants' perpetration of the scheme to defraud alleged in the indictment. *United*

8. **On direct examination, Bright's lawyer asked whether he had "borrowed, used, or whatever we want to term it" "approximately $81,736.28" of the estate's assets. Bright replied that he had, but added he never had "any intention of depriving the heirs of that money" and pointed out that he had begun efforts to return it, by repaying $63,000 some odd dollars of it" and signing a note for the balance.**

States v. Warner, 5 Cir., 1971, 441 F.2d 821, 825, *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). We conclude that there is sufficient evidence to support this essential element of the mail fraud offense.

B. Causing a Mailing for the Purpose of Executing the Scheme

Each separate mailing in furtherance of a scheme to defraud constitutes a separate violation of section 1341. *United States v. Crockett, supra*, 534 F.2d at 593. Here, the indictment enumerated six such mailings: the three letters that Whitten sent to the Ford brothers and Allie Baker informing them of the purported will's existence and the three issues of the *Southern Advocate*, containing the notice to the estate's creditors, which were mailed to the newspaper's subscribers.

[3] First, Bright asserts that we cannot uphold his convictions under Counts I through III of the indictment, since there was no evidence that he caused the letters to be mailed. However, "it is not necessary that a defendant actually do any of the mailing so long as there is sufficient evidence to tie him to the fraudulent scheme which involves the use of the mails." *Milam v. United States*, 5 Cir., 1963, 322 F.2d 104, 107; *see United States v. Crockett, supra*, 534 F.2d at 593. Second, both appellants contend that the letters were sent after completion of any fraud, but as we have already noted, the fraudulent scheme alleged in the indictment went far beyond [2464] the mere forgery of the will. Next, appellants argue that section 1341 does not apply to these mailings because the letters had the effect of alerting the recipients to their rights under the will. The letters were obviously intended, however, to aid appellants in convincing the Fords and Mrs. Baker that a genuine will had been found, thereby easing the documents' course through

probate and helping assure appellants' control of the estate's assets. Thus, the letters were "a part of the execution of the fraud," *United States v. Green, supra,* 494 F.2d at 824; *United States v. Crockett, supra,* 534 F.2d at 593, and were therefore within the scope of section 1341.

[4] Finally, relying principally on *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), appellants urge that we overturn their convictions under Counts IV through VI of the indictment because Mississippi law required them to file the notice to creditors which appeared in the issues of the *Southern Advocate* that were sent through the mails. In *Parr,* the indictment charged the defendants, officials of a Texas school board, with embezzling tax money collected by the school district. It specified the sending of tax notices and receipt of tax payments as mailings done in furtherance of that fraudulent scheme. The Supreme Court reversed the convictions under section 1341, in part because state law in effect required the defendants to cause the mailings set forth in the indictment. However, appellants ignore the crucial distinction between *Parr* and this case. Under state law, the mailings in *Parr* would have occurred irrespective of the defendants' embezzlement; the school district regularly used the mails to send tax notices and receive payments. Here, by contrast, Mississippi's requirement of notice to the estate's creditors was triggered by the fraudulent scheme. If Whitten and Ray Bright had not decided to defraud the estate of their late cousin, they would not have had to comply with the state law requiring them to file the creditors' notice.

Under Mississippi law, appellants had to file the creditors' notice to secure admission of the forged will into probate. A person " 'causes' the mails to be used" when he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably

be foreseen, even though not actually intended." *United States v. Green, supra,* 494 F.2d at 824; *United States v. Crockett, supra,* 534 F.2d at 593. Appellants could have reasonably foreseen that the Chancery Court would follow its normal practice after they filed the notice to creditors, by publishing that notice in the local newspaper which reached most of its subscribers by mail. Since publication of the creditors' notice heightened the false impression that the forged will was valid and thereby increased the chances of successful probate, the mailing of the newspapers was "part of the execution of the fraud" and was therefore covered by the provisions of section 1341.

III. The Supplemental Jury Instructions

Appellants Whitten and Bright next urge two grounds for reversal arising from the district court's supplemental charge to the jury. The jury began its deliberations at 5:30 p.m. on Thursday, February 23, 1978. The judge recalled the jurors at approximately 10:30 p.m., instructing them to recess for the night and to resume at 9 a.m. Friday. The jury returned the next morning and deliberated until 11:55 a.m., at which time the jury foreman sent the judge a note [2465] advising that "the jury feels that they are deadlocked. This has been the situation since approximately 8 p.m. last night, with no changes in votes. Please give us your instructions." The judge read this message to counsel and explained that, after a lunch break, he intended to recall the jury and "give them further instructions with reference to this matter, in response to their request." When court reconvened at 1:40 p.m., the judge reread the note in the presence of the jurors and ascertained that they had taken another vote since sending the message, without change in the result. He then delivered, over the objection of appellants' counsel, a modified version of the "Allen" charge. *Allen v.*

United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The jury retired for further deliberations and returned after one hour and twenty minutes with verdicts of guilty as to both defendants on all counts of the indictment.

[5] Appellants first contend that the district judge erred in failing to inform their counsel, after his first reading of the jury foreman's note, that he intended to give a version of the *Allen* charge. However, a trial judge is not required to notify defense counsel of his plan to use such a charge. If a defendant's attorney is present when the instructions are actually read to the jury and is afforded the opportunity to object, that is sufficient. *United States v. Bailey*, 5 Cir., 1972, 468 F.2d 652, *aff'd en banc* 480 F.2d 518 (1973). Here, appellants' lawyers were present when the supplemental instruction was given and took full advantage of their opportunity to object.

[6] Appellants Whitten and Bright also attack the supplemental instruction itself, claiming that it was "coercive" and otherwise constitutionally infirm. This contention is meritless. The trial judge read a version of the *Allen* charge substantially identical to the instruction approved in *United States v. Skinner*, 5 Cir., 1976, 535 F.2d 325, 326 n. 2, [9] *cert.* [2466] *denied*,

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9. When counsel objected to this instruction, the district judge explained that "[t]he charge which I have just read to the jury is expressly approved by the Fifth Circuit in *United States v. Skinner* . . . . I note a verbatim copy of that charge was read to the jury by the court." the judge instructed the jury:

THE COURT:

Under these circumstances I would like to instruct you further as follows in the hopes that it will be helpful to you in your deliberations.

You should endeavor to reach an agreement if at all possible. Some jury sometime will have to decide this case.

429 U.S. 1048, 97 S.Ct. 756, 50 L.Ed.2d 762, which was in turn derived from the *Allen* charge upheld by this court, sitting en banc, in *United States v. Bailey*, *supra*, 468 F.2d at 661, *aff'd en banc* 480 F.2d 518. In light of the jury's assertion that it was deadlocked and its request for further instructions, the judge did not abuse his discretion in giving this supplemental charge and its use did not "deprive appellant[s] of a fair trial and a unanimous verdict based on proof beyond a reasonable doubt." *United States v. Skinner*, *supra*, 535 F.2d at 326.

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9. (Continued)

The case has been tried out very ably by both sides, and all available evidence has been adduced before you. It seems to me that you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion. Of course, the verdict of the jury must represent the opinion of each individual juror, but it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves.

Each juror should listen with deference to the arguments of the other jurors and with a distrust of his own judgment if he finds the large majority of the jury takes a different view than the view he takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment or that he should close his ears to the argument of other jurors who are equally honest and intelligent as himself.

Accordingly, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the court instructs you, however, that you should examine the issues submitted with an open mind and with candor and with proper regard and deference to the opinions of each other.

It is your duty to decide the case if you can conscientiously do so.

You should listen to each other's arguments with a disposition to be convinced. If a much larger number favors one side or the other, a dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors in the jury room, he is not in error in his views.

IV. The Cross-Examination of the Character Witness

[7-10] Finally, appellant Whitten asserts that the trial court abused its discretion in allowing the Government to cross-examine one of his character witnesses regarding Whitten's alleged reprimand by a judge and bar association for unprofessional conduct. The witness, an attorney, testified under direct examination that Whitten had a good general reputation in his community for veracity and integrity and declared that he would believe Whitten under oath. On cross-examination, the Government asked this witness whether he had "heard that Mr. Whitten was reprimanded by Judge Dick Thomas in November of last year for unprofessional conduct?", and the witness replied, "No, sir, I had not." During recross-examination, the Government queried, "But you had not heard that Mr. Whitten had been reprimanded by the Bar Association through Judge Thomas in DeSoto County?" Whitten's character witness responded, "I was not aware of either one of them." The Government then asked, "Well, the State Bar then, the Mississippi State Bar?", and the witness answered, "I was not aware of that, no sir." Whitten's counsel objected to each of these questions and, at the close of trial, moved for a mistrial; the lower court overruled the objections and denied the motion.

Arguing that he was "substantially prejudiced by this type of cross-examination," Whitten contends that the district judge should have invoked his discretionary power under Fed.R.Evid. 403 to stop this line of questioning, since "its probative value [was] substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403. We disagree. When a witness has testified in support of the defendant's good character, the trial court may in its discretion allow the Government to attempt to undermine the credibility of that witness on cross-examination "by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct

testimony." *United States v. Wells*, 5 Cir., 1976, 525 F.2d 974, 976. However, there are "two important limitations upon judicial discretion in admitting inquiries concerning such prior misconduct: first, a requirement that the prosecution have some good-faith factual basis for the incidents inquired about, and second, a requirement that the incidents inquired about are relevant to the character traits involved at trial." *Id. at 977.* Those requirements are both satisfied here. During a conference in chambers after the defendants rested their case, Whitten's lawyer moved for a mis- [2467] trial, arguing that "the government offered no evidence whatsoever of this highly prejudicial statement" "about a censure from the DeSoto County Bar, the Mississippi State Bar Association for unethical conduct." The Government replied that it was "prepared to show the basis on which we asked the question, that it is a fact, and that our questions were based on that fact." It said that if Whitten's attorney "will stipulate to the letter of reprimand we will introduce that in the record" and volunteered to "move to reopen and call Mr. Whitten for further cross-examination on the matter" if his counsel "thinks it necessary that we prove it." In our view, the Government's proffer of a letter of reprimand for stipulation and its willingness to reopen the case and attempt to prove the fact of Whitten's reprimand demonstrated the necessary "good-faith factual basis for the incidents inquired about." Those incidents were also "relevant to the character traits involved at trial." The character witness, an attorney, testified to Whitten's good reputation for honesty and integrity and the alleged reprimand for unprofessional conduct was relevant to Whitten's community reputation regarding those traits.

AFFIRMED.

APPENDIX B

ALLEN CHARGE:

. . . that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so: that they should listen, with a disposition to be convinced to each other's arguments: that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. ***Allen v. United States***, 164 U.S. 442 501 (1896)

MAIN CHARGE:

It is proper to add the caution that nothing said in these instructions, nothing in any form of verdict prepared for your convenience, is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

As if have said to you before, the jury verdict must represent the considered judgment of each juror. And that applies to each count and to each defendant. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict on each count, as to each defendant must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view of reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. (R. 1432, 1443)

DYNAMITE CHARGE:

Under these circumstances I would like to instruct you further as follows in the hopes that it will be helpful to you in your deliberations.

You should endeavor to reach an agreement if at all possible. Some jury sometime will have to decide this case.

The case has been tried out very ably by both sides, and all available evidence has been adduced before you. It seems to me that you ought to make every effort to arrive at a unanimous verdict and to reach a conclusion. Of course, the verdict of the jury must represent the opinion of each individual juror, but it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves.

Each juror should listen with deference to the arguments of the other jurors and with a distrust of his own judgment if he finds the large majority of the jury takes a different view than the view he takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment or that he should close his ears to the argument of other jurors who are equally honest and intelligent as himself.

Accordingly, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the court instructs you, however, that you should examine the issues submitted with an open mind and with candor and with proper regard and deference to the opinions of each other.

It is your duty to decide the case if you can conscientiously do so.

You should listen to each other's arguments with a disposition to be convinced. If a much larger number favors one side or the other, a dissenting juror should consider whether, in the light of the opinions that are expressed by the other jurors in the jury room, he is not in error in his views.

This has been a long trial. We have been in the trial for about two weeks. This is the second week. And, as I said to you, the case has been well tried. And I think, with those further instructions, that you should retire to give further consideration to your verdict.

All right, Mr. Marshal, take the jury to the jury room.
(R. 1443, 1444, 1445)